United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

75-1265

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P/S

To be argued by
WALTER J. HIGGINS, JR.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA, :

Docket No. 75-1265

Appellee, :

-against- :

WILLIAM PATE DEVONE, :

Appellant. :

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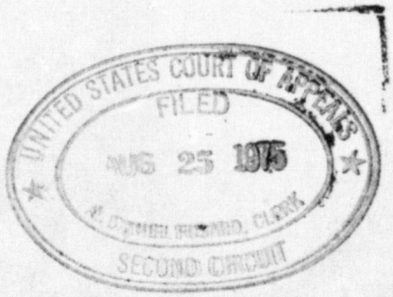
BRIEF FOR APPELLANT

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK



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QUESTIONS PRESENTED

1. Whether certain prejudicial statements made by the prosecutor in his opening and closing statements to the jury resulted in a denial of a fair trial?

2. Whether the District Court's insistence on giving a full Allen charge after the jury indicated its inability to reach verdicts as to certain counts due to a wide divergence of opinion resulted in a denial of a fair trial?

STATEMENT PURSUANT TO RULE 28(3)

Preliminary Statement

William Pate Devone appeals from a judgment of conviction entered on July 9, 1975 in the United States District Court for the Southern District of New York following a two day trial before the Honorable Lee P. Gagliardi, United States District Judge and a jury. Indictment 75 Cr. 283 was filed on March 18, 1975 charging the defendant in counts 1 through 10 with uttering forged government checks and counts 11 and 12 with possession of stolen mail in violation of Sections 495 and 1708 of Title 18 United States Code. Trial commenced on May 28 1975 and concluded on May 30, 1975 when the jury returned a verdict of not guilty as to 7 counts and guilty as to 5 counts.

On July 9, 1975, Judge Gagliardi sentenced the defendant to a term of imprisonment of 3 months on each of the counts 2, 3, 7, 8 and 12, to run concurrently. The defendant is released on his own recognizance pending appeal.

This court granted leave to appeal in forma pauperis and Walter J. Higgins, Jr., Esq. was continued as counsel on appeal pursuant to the Criminal Justice Act.

Statement of Facts

In November, 1974, United States Postal Inspectors conducted an investigation of a group of forged government checks which bore a secondary endorsement of William Pate Devone and had been cashed at a Daitch Shopwell supermarket located on Featherbed Lane in the vicinity of 173rd Street and University Avenue, in Bronx, N. Y. As a result of the investigation the postal inspectors arranged an interview on November 26 1974 ~~on~~ between William Pate Devone, who was the frozen food manager of the Daitch Shopwell, and Roy D. Nedrew, Special Agent of the U. S. Secret Service. After being advised of his constitutional rights, Mr. Devone stated that during the summer of 1974 he assisted several individuals in cashing U. S. Treasury and New York City Welfare checks at the supermarket where he was employed. He did this by endorsing the checks as a secondary endorsee and presenting them to the store's manager, knowing full well that if the checks bounced he was financially responsible (Tr. 68-70).

Mr. Devone stated that in early May, 1974, a person from the neighborhood, known to him as "Buba", approached him and offered participation in a stolen check cashing

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References to "Tr." are to the pages of the trial transcript.

conspiracy, which offer was rejected by Mr. Devone. He further stated that approximately one week later he was accosted in a hallway of his apartment residence by Buba, who threatened that unless Devone participated in cashing of certain checks at the supermarket, Mr. Devone and/or his family would be physically harmed. Buba displayed to Devone what he believed was a pistol (Tr. 70-71).

Sometime in May, 1974, Buba came into the Daitch Shopwell and for the first time presented a check to Mr. Devone who, in turn, endorsed the check in his own name and presented it to the store manager for payment. Thereafter, throughout the summer of 1974, approximately 8 to 10 other people came into the store and presented checks to Devone with the statement that Buba had sent them. Accordingly, Devone endorsed each check and presented them for payment to the store manager. Devone denied receiving any of the proceeds of these checks or any consideration for his assistance in arranging encashment (Tr. 71-72).*

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*It should be noted that the government offered no credible proof that Devone in any way benefited financially from the proceeds of these checks.

Sometime in August, 1974, when the first of the checks were returned, Devone went to Buba and asked for monies to make good on the bad checks. Devone stated that Buba refused to give him any funds saying that he, Devone, had an opportunity to participate in the enterprise on a profit basis but because he had refused, Buba would not give any money to make good on the checks.

After admitting his own participation in encashment of certain government checks during the summer of 1974, Mr. Devone told Agent Nedrew that he was willing to cooperate with the government in any subsequent prosecutions (Tr. 74-75, 81-83).

Daisy Brown testified on behalf of the government. She was a cashier at the Daitch Shopwell during the summer of 1974. She testified that Devone resided with her and her child from approximately February through September, 1974. She stated that she knew of the person known as Buba who resided and frequented the neighborhood of Featherbed Lane and who was known as a neighborhood ruffian (Tr. 158-9). She testified as to having heard of Buba assaulting a security guard named Terry in the Daitch Shopwell and also to having seen Buba in the premises of the supermarket (Tr. 161-163).

Mr. Derry Allen, manager of the Daitch Shopwell where Mr. Devone was employed, testified at the trial that Devone had been employed at that branch at Daitch Shopwell throughout the two-year period during which Mr. Allen was the manager. During that time Mr. Devone, in addition to his duties of managing the frozen food section, which included responsibility for receiving and shelving of frozen goods, also conducted other job functions as the need arose, including handling the cash register. To Mr. Allen's knowledge, Mr. Devone had always been a responsible and an honest employee of Daitch Shopwell (Tr. 50-52).

In about late August, 1974 when a few checks were returned, Mr. Allen informed Mr. Devone that he, Devone, was responsible for making up the loss to the store. At a subsequent meeting between the district manager, Mr. Allen and Mr. Devone, it was agreed that Mr. Devone make periodic payments of the funds lost by the store. In September, 1974, Mr. Devone repaid approximately $495.00 to Daitch Shopwell, the funds for such repayment having been obtained by a personal loan taken down by Mr. Devone (Tr. 57-58). Mr. Allen further stated that Devone was still an employee of Daitch Shopwell. Mr. Allen admitted that during the same period of time he himself had personally endorsed and

authorized the encashments of in excess of 15 government checks which had been returned as forged (Tr. 55-56, 63).

Isaac Gary, also known as Buba, was called as a government witness. He admitted that he resided in the neighborhood of Featherbed Lane and that he had seen the defendant, Devone, in that neighborhood during the summer of 1974. Mr. Gary denied any participation in the cashing of forged government instruments and further denied threatening the defendant with bodily injury unless assistance was given to cashing forged checks. Mr. Gary admitted to an extensive criminal record over the prior 10-year period including convictions for armed robbery, assault with a deadly weapon and mugging. Mr. Gary was at the time of his testimony serving a sentence on a weapons charge which commenced in early October, 1974 (Tr. 114-122).

The balance of the Government's case consisted of reading certain stipulations entered into by the parties relating to the proper issuance, mailing and non-receipt by the payees of the checks involved.

At the conclusion of the Government's case defense counsel moved for a judgment of acquittal. When the motion was denied, the defense rested.

After deliberation the jury convicted the defendant of five of the twelve counts.

POINT I.

CERTAIN STATEMENTS BY THE PROSECUTOR IN HIS OPENING AND CLOSING STATEMENTS TO THE JURY AMOUNTED TO EXPRESSIONS OF HIS PERSONAL DISBELIEF OF THE DEFENDANT'S COERCION DEFENSE. SUCH STATEMENTS IMPROPERLY EXPLOITED THE DIGNITY AND INFLUENCE OF THE UNITED STATES ATTORNEY'S OFFICE IN THE JURY'S EYES AND CONSEQUENTLY DENIED APPELLANT HIS RIGHT TO A FAIR TRIAL.

During opening and closing statements to the jury it is essential that a prosecutor not express his own or the United States Attorney's opinion as to the credibility of the defense or the defendant's culpability. To do so is unquestionably highly prejudicial to a defendant's right to a fair trial because of the likelihood that the jury will attach special significance to the prestige of the United States Attorney's Office. United States v. Santana, 485 F.2d 365, 370 (2d Cir. 1973); ABA Standards Relating to the Prosecution Function, Approved Draft 1971, §5.8 Argument to the jury, at 126-7.

In recent years this Court repeatedly has had occasion to express its concern with the frequency of allegations of

of prosecutorial misconduct during opening and closing statements to the jury. United States v. Bivona, 487 F.2d 443 (2d Cir. 1973); United States v. White, 486 F.2d 204, 206 n. 4 (2d Cir. 1973) (numerous cases cited). Indeed, this Court cautioned that such conduct, if repeated, would necessitate reversal as opposed to mere reprimand, in order to achieve a greater impact on the prosecutor's conduct of trials in the future. United States v. White, supra, 487 F.2d at 447.

This case presents yet another incident of a prosecutor expressing his own opinion and that of his office as to the merits of the defendant's defense, which we submit denied the defendant a fair trial and requires this Court to decide whether mere reprimand has sufficient impact to prevent similar conduct in the future. From the commencement of the trial the central issue for the jury to decide was whether the defendant had been coerced, against his will, to participate in the check cashing scheme. In his opening statement the prosecutor said:

> "The question I feel that is important here is whether Mr. Devone's story of threats by an alleged Buba is correct. You have to determine that." (Tr. 25)

After telling the jury of what the Government's proof would be establishing Mr. Devone's participation in the cashing of the forged checks, the prosecutor foretold the proof of Mr. Devone's post-arrest statement in which he sought to explain his admitted role of cashing forged checks. The prosecutor said:

> "You will also hear from Mr. Roy Nedrew, who is a United States Secret Service Agent. He interviewed Mr. Devone, after properly advising of his rights, and Mr. Devone admitted that he authorized these checks.
>
> "As we go along, Mr. Devone begins to realize that he has put himself in a very delicate position with respect to violating the law, hence we have an excuse. Mr. Devone at the time he was interviewed by Mr. Nedrew found the most flimsy excuses that I believe you will find, and that is that a person known as Buba threatened to kill me, my wife and family, if I didn't cash these checks." (Tr. 24) (Emphasis added)

Finally, the prosecutor concluded his opening statement by saying:

> "I feel confident that you will exercise your reason, your judgment, and upon hearing the facts as introduced through the testimony of witnesses and the exhibits, you will conclude that Mr. Devone is guilty of these violations beyond a reasonable doubt." (Tr. 26) (Emphasis added)

Having improperly injected his personal opinion from the outset of the trial as to the merits of the

defense, the prosecutor compounded the prejudice to the defendant during the closing argument. In attempting to rebut a defense argument that the Government had conducted an unprofessional investigation in failing to take advantage of the defendant's offer to cooperate and testify against the true culprits of the check cashing scheme, the prosecutor pointed out that, as early as August, 1974, a Government informant, Archie Melton, had inculpated the defendant, who was arrested in November, 1974. The prosecutor then said:

> "The Government, of course, does not indict people without sufficient reason to believe that the person is culpably involved in some kind of illegal act.
>
> "The COURT: The fact that an indictment has been returned here, as I charged the jury before, is of no significance other than to inform the defendant of the charges against him and that's the sole purpose of the indictment. Very well.
>
> "Mr. GARNETT: In any event the Government continued the investigation in this case. They spoke with Devone; voluntarily he submitted himself to the interview. . . Only after he gave his statement did the Govern- arrest Devone." (Tr. 228-229) (Emphasis added)

In the context of this case the closing remarks of the prosecutor were totally unwarranted and had the effect

of expressing personal disbelief of Devone's explanation as to how he became a participant in the check cashing scheme. (Defense counsel's motion for mistrial based on these remarks was denied. Tr. 238-9). Early during the course of its deliberations the jury made quite apparent that the central issue was the defense of coercion and that a verdict could not be reached. The jury asked to have reread those portions of the charge dealing with coercion and wilfullness (Tr. 277). Shortly thereafter the jury sent a note saying it was unable to reach a unanimous verdict (Tr. 279). The verdict as finally rendered, only after an "Allen" charge, found the defendant guilty only as to the five counts relating to checks issued after July 18, 1974, and acquitted as to the seven checks issued from May through July 18, 1974. Obviously, the jury compromised in its verdict by convicting on the last five checks in chronological order. When viewed in this context, the prosecutor's remarks take on a blatantly inflamatory role in that those members of the jury for conviction most certainly were citing the personal beliefs of the prosecutor and his office that the defendant's explanation of coercion was not worthy of belief. Those jury members initially for acquittal on all counts surely were persuaded, at least in part, to convict on the last five checks chronologically by the cited inflamatory personal beliefs expressed by the prosecutor.

In view of the brevity of the trial, the simplicity of the fact pattern and the total lack of justification for the prosecutor's remarks, We submit that the only remedy is a reversal of the judgment of conviction and a remand for new trial.

POINT II.

THE DISTRICT COURT'S INSISTENCE ON GIVING A SUPPLEMENTAL "ALLEN" CHARGE AFTER THE JURY WAS UNABLE TO REACH A VERDICT ON ALL COUNTS COERCED A COMPROMISE VERDICT AND DENIED THE DEFENDANT HIS RIGHT TO A FAIR TRIAL.

While this Court has repeatedly upheld the giving of a supplemental "Allen" charge after the jury has reported an inability to reach a unanimous verdict, United States v. Tyers, 487 F.2d 828, 832 (2d Cir. 1973) (cases cited), the defendant submits that the supplemental charge as given the jury, coupled with the circumstances of this case, had the effect of coercing a compromise verdict and thereby denying the defendant his right to a fair trial.

The presentation of evidence began on a Thursday morning at 9:30 A.M. and was completed by 4:30 P.M. the same day, with an intervening luncheon recess. Closing arguments and the charge to the jury began and were completed

the following Friday morning. The jury commenced its deliberations at 12:19 P.M. that afternoon (Tr. 274). The jury's first note requested all the exhibits, which were promptly made available to them. At 3:15 P.M. the jury's second note requested the Court to reread that portion of the charge relating to wilfullness and coercion, which was complied with in open court. The jury recommenced deliberations at 3:18 P.M. (Tr. 277-9). At 3:50 P.M. the jury's third note reported that the jury was unable to reach a unanimous verdict (Tr. 279).

At this time the Court stated it intended to inquire if the jury had arrived at a verdict as to any of the counts and, if not, to give them a supplemental "Allen" charge, quoting directly from the Supreme Court opinion (Tr. 279). Defense counsel objected to this procedure on the ground that the Court already had instructed the jury as to the manner in which they should conscientiously conduct their deliberations, and to give a straight Allen charge at that juncture would be unduly prejudicial and coercive (Tr. 279-280). When the jury came in for the supplemental charge, the forelady reported that the jury was interrupted in the process of polling unanimous

verdicts on two counts. The jury was permitted to complete the poll in private and reported back at 4:10 P.M. with verdicts of not guilty on two counts. The Court then inquired if further deliberations would be helpful in resolving any further dispute. The forelady responded that there was too much variance in the vote (Tr. 282-3).

The Court then proceeded to instruct the jury that they should continue their deliberations, that the case was important to all parties involved, that a juror should not surrender his conscientious, considered judgment, and that their decision should be based on the evidence. The Court then read that portion of the Allen opinion which in substance coerces the average juror into believing that the majority opinion as expressed by his fellow jurors must be the right one (Tr. 282-285). The jury recommenced deliberations at 4:15 P.M. At 5:40 P.M., on Friday evening, the jury returned with the verdict of guilty on the five checks last in chronological order (Tr. 285).

To date no less than three Circuit Courts other than this Court, in the exercise of their supervisory powers, have rejected the use of a supplemental Allen charge under circumstances such as those present in this case. See Wright, Federal Practise and Procedures, Criminal, 502,

Supplemental Instructions, at 132 supp. pham. (1969 ed.). In addition, the ABA Advisory Committee on the Criminal Trial has concluded and recommended that an Allen charge should not be given in circumstances such as this case. ABA Standards Relating to Trial by Jury, Approved Draft 1968, §5.4, Length of deliberations - deadlocked jury, at 145-156.

In view of the brevity of the trial, simplicity of the fact pattern, the defendant's admission of the crime by assertion of a coercion defense and the rereading to the jury of the wilfullness and coercion charges, we submit that the Allen charge as given under these circumstances was unduly coercive and denied the defendant his right to a fair trial. See United States v. Beckerman, Docket No. 74-2478 (decided May 13, 1975) (slip op. at 3508).

CONCLUSION

FOR THE ABOVESTATED REASONS, THE JUDGMENT OF COERCION SHOULD BE REVERSED AND THE MATTER REMANDED TO THE DISTRICT COURT FOR RETRIAL.

Respectfully submitted,

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